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No. 80-601

SUPREME COURT OF THE UNITED STATES

October Term 1980

KENNETH G. CASSADY - - - - Petitioner

versus

JOANN GREEN - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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October 9, 1980

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Did the District Court Judge abuse his discretion in awarding the sum of One Thousand Seven Hundred Sixty Five Dollars ($1,765.00) to Respondent's attorney in a case wherein the Respondent did not prevail?

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SUPREME COURT OF THE UNITED STATES

October Term 1980

No.

KENNETH G. CASSADY - - - - - *Petitioner*

v.

JOANN GREEN - - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, KENNETH G. CASSADY, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered August 15, 1980 affirming the District Court's granting attorney's fees to an unsuccessful litigant in a suit brought under 29 U.S.C. §529 and §412.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 15, 1980 (see Appendix, pp. 12-13). The Opinion was not reported as of this time. The Opinion for the United States District Court, Western District of Kentucky, was entered on February 15, 1979 (see Appendix, p. 11). This Opinion was not reported.

JURISDICTION

The Order of the United States Court of Appeals, Sixth Circuit, was entered on August 15, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §1254(1).

QUESTION PRESENTED

Did the District Court Judge abuse his discretion in awarding the sum of One Thousand Seven Hundred Sixty Five Dollars ($1,765.00) to Respondent's attorney in a case wherein the Petitioner did not prevail?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. §529 states:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel or otherwise discipline any of its members for exercising any rights to which he is entitled under the provisions of this Act. The provisions of Section 102 [29 U.S.C.S. §412] shall be applicable and the enforcement of this section.

29 U.S.C. §412 states:

> Any person whose rights secured by the provisions of this title [29 U.S.C.S. §411-415] have been infringed by any violation of this title [29 U.S.C.S. §411-415 of this title] may bring a civil action in a district court of the United States for

such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States of the district where the alleged violation occurred, or where the principle office of such labor organization is located.

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit entered an Order on February 15, 1979 directing that Respondent Green recover attorney's fees incurred pursuant to her action against Petitioner Kenneth Cassady under 29 U.S.C. §529 and §412.

The United States District Court for the Western District of Kentucky at Louisville granted a partial Summary Judgment for Petitioner Cassady, finding that "an action for libelous remarks made by a Union member in the context of Union affairs does not lie under the above-cited statutes, see *Salzhander* v. *Caputo,*" 316 F. 2d 445, 448-9 (2nd Cir. 1963). However, the District Court found that Respondent "has stated a cause of action insofar as recovery of attorney's fees is concerned for the actions taken by the Defendant. . . ."

Petitioner Cassady appealed the award of attorney's fees to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals found that "Awards of attorney's fees are reviewable only for an abuse of discretion. *Hall* v. *Cole,* 412 U. S. 1 at 14-15." The Court also stated that "given the small amount of fees awarded in this case, the District Court did not abuse its discretion."

Petitioner is petitioning the Supreme Court of the United States to grant a Writ of Certiorari for the purpose of reviewing the Order of the United States Court of Appeals for the Sixth Circuit.

REASON FOR GRANTING THE WRIT

1. It Is an Abuse of Discretion for the District Court to Award Attorney's Fees to a Party Under 29 U.S.C. §412 and §529 Where the Party Has Not Prevailed in the Action and Also Where the Nonprevailing Party Renders No Common Benefit to the Membership of the Union.

This case actually involves two actions. The first action arose when the Petitioner allegedly made slanderous remarks concerning Respondent. The Petitioner, who is the President of Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO, requested a Union trial for alleged violations of the Union's constitution by Respondent.

The second part of this case involves Respondent's attorneys making an application for Restraining Order to restrain the Union President from proceeding with the Union trial against the Respondent. Before a trial was held, the Petitioner withdrew the charges and proposed suspension against the Respondent. A Partial Summary Judgment was granted by the District Court on the issue of the slander. The Court held that there can be no action for slander in the labor law context, and cited *Salzhander* v. *Caputo,* 316 F. 2d 445, 449 (2nd Cir. 1963). The District Court subsequently granted Respondent's attorney's Motion for Attorney's

Fees in the amount of One Thousand Seven Hundred Sixty Five Dollars ($1,765.00).

The issue of attorney's fees was appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals upheld the District Court, saying, among other things:

> . . . awards of attorney's fees are reviewable only for an abuse of discretion. *Hall, supra* at 14, 15. Given the small amount of fees awarded in this case, the District Court did not abuse its discretion.

It is the contention of the Petitioner that the amount of attorney's fees granted has no bearing on the question of the District Court's abuse of discretion. The Court of Appeals cites *Hall* v. *Cole,* 412 U. S. 1, 14-15, as the authority for its allowance of attorney's fees. Petitioner contends that the instant case may be radically distinguished from *Hall* v. *Cole, supra.*

In the instant case, Respondent sought only to vindicate her personal right through the slander action. Charges against Respondent which would have suspended her from the Union for fifty years were dropped prior to application for a Restraining Order. In the *Hall, supra,* action the Court found that the plaintiff suffered a violation of his rights under 29 U.S.C. §411-415 and thereby conferred a "substantial common benefit" on the membership of the union by pursuing his rights in federal court. The plaintiff was awarded attorney's fees in this action because the Court found that he vindicated the entire membership's right to sue.

In this action, no common benefit was conferred upon the membership of the Union as slander is a purely personal action. In fact, the Court granted a Partial Summary Judgment in favor of Petitioner on the issue of slander.

In the *Hall* v. *Cole* case, *supra,* the plaintiff actually prevailed in that action, whereas in the instant case the Respondent vindicated neither her personal rights nor any rights to the membership of the Union. Respondent had been opposed to actions taken by the Executive Board of Local 761 pursuant to a Union membership vote. Respondent filed suit against the Executive Board of the Union to halt any actions taken by the Board. This suit led to the actions by Respondent in which he sought to convene a Union trial in which to seek to determine whether Respondent had violated the Union constitution. Petitioner subsequently withdrew his attempt to convene a Union trial. *A Restraining Order was never issued,* emphasis added, as Respondent suffered no harm as she was not suspended, fined, expelled or deprived in any way of her rights as a Union member.

In *Hall* v. *Cole, supra,* the two theories stated by the Court for a recovery of attorney's fees are the "common benefit theory," when a particular Union member is vindicating a right that will benefit the entire Union membership and where the defendant exhibited bad faith in his attempt to deprive plaintiff of his rights.

In the instant case, Respondent's attempt to recover damages from Petitioner for his allegedly slanderous remarks in no way vindicates rights belonging to the

entire Union membership, nor was there any bad faith found on the part of the Petitioner.

The crux of the argument granting an award of attorney's fees in a case brought under 29 U.S.C. §411, *et seq.*, is that to preserve Union democracy, a member may recover his attorney's fees if he brings an action which confers a "common benefit" to the remainder of the Union members. However, in this case, democracy was already being preserved. The Union constitution (Article 24) dictates that any member may file charges against another member when he feels that the Union's constitution has been violated. Petitioner had requested a Union trial to determine whether the Respondent had violated the Union constitution. Respondent was given notice of the proposed trial and the charges against her. Democracy was functioning within this Union, as mandated by 29 U.S.C. §411, *et seq.*

Respondent was never suspended from her Union. Her Union rights had never been violated. She was never brought up on Union charges.

The Order of the United States Court of Appeals for the Sixth Circuit stated that "Green rendered a service to the class of Union members by vindicating their right to sue in District Court." In reality, Respondent has vindicated no right common to the class of Union members.

Petitioner also contends that awarding attorney's fees in a case of this nature could create a great deal of harm in the labor area. A District Court might grant attorney's fees to any Union member who was

threatened with discipline for allegedly violating that Union's constitution, even though the member was accorded his rights under 29 U.S.C. §411, *et seq.* Union officers would be helpless to enforce their Unions' constitutions.

It is the absolute right of the Petitioner to seek a hearing and a possible penalty for any member which he believed violated the Union constitution. The attempt by Petitioner to institute a Union trial for Respondent was withdrawn before the trial was scheduled to begin. If the award of attorney's fees is granted under the "common benefit theory," Respondent would be hard pressed to show that she incurred attorney's fees in the amount of $1,765.00 for an application to the Court for a Restraining Order.

Respondent was never deprived of her rights as a Union member. After the attempt at the creation of a Union trial was withdrawn, the Respondent pursued her lawsuit for her personal ends and not as a common benefit to the Union membership.

CONCLUSION

Petitioner believes that it was an abuse of discretion for the District Court to award attorney's fees in this action, as Respondent was not deprived of any rights. In the alternative, Petitioner maintains that it was an abuse of discretion for the District Court to award attorney's fees for any amount beyond the amount incurred by Respondent's attorneys beyond their duties of preparing a Temporary Restraining Order.

Respectfully submitted,

WILLIAM L. HOGE, III
1112 Kentucky Home Life Bldg.
Louisville, Kentucky 40202
(502) 584-8303

Counsel for Petitioner

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 76-0504 I

JO ANN GREEN - - - - - - - *Plaintiff*

v.

KENNETH CASSADY - - - - - *Defendant*

ORDER—Entered February 15, 1979

Motion having been made by Cecil A. Blye, attorney for plaintiff, herein, for attorney fees incurred by plaintiff, and the Court having examined exhibits and Affidavit of counsel, and the Court being sufficiently advised, said motion is SUSTAINED and it is ORDERED that plaintiff JoAnn Green recover attorney fees incurred in this action in the sum of $1,765.00 from defendant Kenneth Cassady, all for which execution may issue.

This is a final and appealable order and there is no just cause for delay.

(s) Charles M. Allen, Judge
United States District Court

Tendered By:

(s) Cecil A. Blye
Attorney for Plaintiff
608 W. Muhammad Ali Blvd.—Suite 403
Louisville, KY 40203
Phone: 585-4266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-3260

JoAnn Green - - - - - *Plaintiff-Appellee*

v.

Kenneth Cassady - - - *Defendant-Appellant*

ORDER—Filed August 15, 1980

Before: Engel, Keith, and Jones, Circuit Judges.

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and the record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Cassady appeals from an order of the District Court granting attorney's fees to Green in this action under the Labor-Management Reporting and Disclosure Act. The District Court found that Cassady could not be sued for slander for remarks made in the context of union affairs but that he was liable for attorney's fees for using disciplinary procedures to punish Green for filing a suit against the union and its officers.

Cassady argues that Green did not prevail in her request for damages in this case and, therefore, was not entitled to attorney's fees. It is true that there can be no action for slander in the labor law context. *Salzhander* v. *Caputo,* 316 F. 2d 445, 449 (2nd Cir. 1963). However, a member cannot be disciplined for failure to follow the requirements of the union constitution prior to filing a suit

in district court. *Ross* v. *International Brotherhood of Electrical Workers,* 544 F. 2d 1022, 1025 (9th Cir. 1976). So the District Court was correct in ruling that Green was entitled to relief.

Cassady also argues that the union membership received no common benefit from Green's action. *Hall* v. *Cole,* 412 U. S. 1, 4-8 (1973). In *Hall,* the Court said that Cole rendered a service to the class of union members by vindicating their right to free speech. In the present case, Green rendered a service to the class of union members by vindicating their right to sue in district court.

Cassady's final argument is that once a union has abandoned its unlawful position, no further attorney's fees should be awarded. *Cox* v. *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators,* 398 F. Supp. 239, 242 (D.C. Ga. 1975). However, Cassady did not present this argument to the court below, so it is not properly before this Court. *Harrington* v. *Vandalia-Butler Board of Education,* 585 F. 2d 192, 197 (6th Cir. 1978), *cert. denied,* 441 U. S. 932 (1979).

In any event, awards of attorney's fees are reviewable only for an abuse of discretion. *Hall, supra,* at 14-15. Given the small amount of fees awarded in this case, the District Court did not abuse its discretion.

Upon consideration, it is ORDERED that the judgment of the District Court be affirmed under Rule 9(d)3, Rules of the Sixth Circuit, because the issues are unsubstantial and do not require oral argument.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

(s) Sara L. Altman
Deputy Clerk

80-601

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

KENNETH G. CASSIDY - - - - Petitioner

versus

JOANN GREEN - - - - - Respondent

PETITION TO DENY WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CECIL A. BLYE
608 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 585-4266
Counsel for Green

December _____, 1980.

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

COUNTER-STATEMENT OF QUESTION PRESENTED

The District Court Judge did not abuse his discretion in awarding the sum of One Thousand Seven Hundred Sixty-Five Dollars ($1,765.00) to Respondent's attorney where Respondent, in good faith, pursued her rights under Title I, Labor Management Reporting and Disclosure Act.

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

KENNETH G. CASSIDY - - - - *Petitioner*

v.

JOANN GREEN - - - - - *Respondent*

PETITION TO DENY WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, JoAnn Green, respectfully urges that a Writ of Certiorari be denied to review the proper Order of the United States Court of Appeals for the Sixth Circuit entered August 15, 1980, affirming the decision of the District Court in awarding attorney fees to Respondent for vindicating her right to sue under 29 U.S.C. § 411, § 412, § 521, and § 529.

OPINION BELOW

The unreported Opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 15, 1980. The unreported Opinion of the United States District Court for the Western District of Kentucky was entered on February 15, 1979.

JURISDICTION

The Court's Jurisdiction is authorized by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 529 states:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel or otherwise discipline any of its members for exercising any rights to which he is entitled under the provisions of this Act. The provisions of Section 102 [29 U.S.C.S. § 412] shall be applicable and the enforcement of this section.

29 U.S.C. § 412 states:

> Any person whose rights secured by the provisions of this title [29 U.S.C.S. § 411-415] have been infringed by any violation of this title [29 U.S.C.S. § 411-415 of this title] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States of the district where the alleged violation occurred, or where the principle office of such labor organization is located.

COUNTER-STATEMENT OF THE CASE

On or about January 27, 1976, pursuant to Title 29, U.S.C., § 501, JoAnn Green filed suit against Local 761, International Union of Electrical, Radio, and Machine Workers Union, alleging misuse of union funds by Kenneth Cassidy and others in support of anti-busing activities in Louisville, Jefferson County, Kentucky. The case is presently on appeal in the Sixth Circuit (No. 79-3259).

On January 29, 1976 in reprisal, union President Kenneth Cassidy filed intra-union charges against JoAnn Green and held a press conference on the steps of the United States Courthouse in Louisville and told the news media that he was going to suspend JoAnn Green from the Union for 50 years for filing suit against the union and its officers. He also preferred intra-union charges against her (Appendix pages 9-10).

JoAnn Green made application to the Court for a temporary restraining order against Cassidy to prevent the 50 year suspension from the Union. Hearing was held on February 3, 1976, at which the Court was informed by counsel that Cassidy had withdrawn the charges and the TRO matter had become moot.

The present action arose when JoAnn Green sued Cassidy for taking reprisal against her and "otherwise disciplining" her for exercising her rights under the Act by filing suit in good faith against misuse of union funds in support of anti-busing activities.

The suit was disposed of by summary Judgment in the District Court in favor of Cassidy, with the Court

awarding attorney fees to JoAnn Green in the amount of $1,765.00 for diligent pursuit of her rights under the Act.

On appeal to the Sixth Circuit by Cassidy, the Court held that the issues were unsubstantial and did not need oral argument. The District Court decision was affirmed.

REASON FOR NOT GRANTING THE WRIT

The petitioner misinforms this Court when he asserts in his Brief that JoAnn Green "sought only to vindicate her personal right through slander action."

JoAnn Green filed this lawsuit to seek relief for the reprisal action taken against her by the Union President, Cassidy, in announcing to the world that he was suspending her from the union for having sued the union. Within the purview of the Act, this reprisal action by Cassidy constitutes punishment and "otherwise discipline" for a union member who sought relief for violation of her federally protected right to sue.

Cassidy would have this Court believe that JoAnn Green filed a personal slander lawsuit for her personal benefit. The suit was filed to seek relief for the punishment, reprisal, and "otherwise discipline" that Cassidy had decreed for JoAnn Green.

The precise common benefit conferred upon the total union membership by JoAnn Green's lawsuit is easily identifiable: Every union member now knows that he or she may sue under the Act without fear of reprisal, punishment, or discipline from the powerful President of the largest labor union in Kentucky.

Further, Cassidy would have this Court believe that JoAnn Green was awarded attorney fees for applying to the Court for a Restraining Order. The activity in this lawsuit covered three years at great expense to JoAnn Green. The union President, Cassidy, did not voluntarily abandon his plan to suspend JoAnn Green for 50 years. This lawsuit caused Cassidy to withdraw the intra-union charges against JoAnn.

This lawsuit by JoAnn Green, in effect, gave notice to her union that each member has federally protected rights to sue to protect the organization from misuse of union funds.

Cassidy's allegation that no common benefit accrued to the union membership and his interpretation of the case of *Hall* v. *Cole,* are grossly inaccurate.

JoAnn Green, by her application for Temporary Restraining Order and filing this lawsuit defended and protected the right to sue by all union members. In *Hall* v. *Cole,* 412 U. S. 1, 93 S. Ct. 1943, 36 L Ed 2d 702 (1972). This Court upheld the discretionary award of attorney fees and the Court's decision is succinctly restated in the Ninth Circuit case of *Ross* v. *International Brotherhood of Electrical Workers,* 544 F 2d 1022 (1976):

> "In *Hall* v. *Cole,* the Supreme Court listed two grounds for discretionary award of attorney fees. (1) The suit was a benefit for the union and the membership. (2) The defendant acted in bad faith.
>
> If either ground is present, the award of fees is permissible at the discretion of the District Court.

> By defending protection of the right to sue, Ross benefitted all the union members. Thus, attorney's fees are allowable."

JoAnn Green submits that both conditions set forth in *Hall* and the dicta expounded in *Ross* are present in the case at bar.

Regardless of the outcome of the suit in the District Court, it was a benefit for the union membership because it advanced and protected each member's right to sue under the Act.

The reprisal action by Cassidy to suspend JoAnn for 50 years was malicious and reeked of bad faith. The charges and the vengeful statements of expulsion made by Cassidy to the media unquestionably were made in bad faith to otherwise discipline JoAnn Green.

CONCLUSION

For the reasons hereinabove stated, the Court is urged to deny the Writ of Certiorari and affirm the decision of the Court of Appeals.

Respectfully submitted,

CECIL A. BLYE
608 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 585-4266
Counsel for Green

CERTIFICATE

I certify that a copy hereof was mailed on December 8, 1980 to Attorney William L. Hoge, III, 1112 Kentucky Home Life Building, Louisville, Kentucky 40202.

CECIL A. BLYE

APPENDIX

January 29, 1976

James Luckett
Recording Secretary
Local 761, IUE
5153 Poplar Level Road
Louisville, Kentucky 40219

Dear Mr. Luckett:

My name is Kenneth G. Cassady. I am a member in good standing of Local 761, IUE. I am exercising my rights as a member of Local 761 and as President of Local 761 by filing charges against Mrs. JoAnn Green, Pay #723602, according to our Local Constitution and By-Laws, Article VI, Section 10, paragraphs (3) and (4).

Mrs. Green violated paragraph (3) by refusing to carry out the decision of the Membership which was voted on in February, 1974, August, 1975, and January, 1976, whereby the Membership adopted a resolution against busing, which was written by two minorities, Nancy McKinley and Walter Teasley, and where the Membership voted to spend money to protest the actions taken and where the Membership voted to join U.L.A.B.

Mrs. Green violated paragraph (4) by doing something detrimental to Local 761, IUE, by filing suit in Federal Court to put money back into funds that the Membership acted on, thus causing or going to cause Local 761 to lose countless hours to be spent defending Membership action when we could be resolving problems in the plant, plus costing Local 761 probably thousands of dollars to defend ourselves for carrying out Membership action.

I strongly recommend that since Mrs. Green did not follow Union rules by filing complaints through our Union the proper way, but instead violating our Constitution, and

that since she is interested in going her separate way and wants to control her dues money personally, that she be removed as a Member of Local 761, IUE for a period of fifty (50) years.

/s/ Kenneth G. Cassady
Pay #165720
Building #6, Section 50F